

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Reallocation and Service Rules)	
for the 698-746 MHz Spectrum)	WT Docket No. 99-168
Band (Television Channels 52-59))	
)	
Auction of Licenses in the)	DA 02-260
698-746 MHz Band Scheduled)	Report No. AUC 02-31-A
for June 19, 2002)	(Auction No. 31)

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

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Dated: February 19, 2001

TABLE OF CONTENTS

	Page
SUMMARY	iii
I. Auction No. 31 Must Not Be Delayed.	2
II. Linking the Upper and Lower 700 MHz Auctions Must be Rejected.	7
Conclusion	11

SUMMARY

The upper 700 MHz auction must not be delayed. The success of the Commission's upper 700 MHz band-clearing policies depends on Auction No. 31 taking place as currently scheduled, on June 19, 2002. The Commission also is bound by statute to make certain that the 700 MHz auction process is completed by September 30, 2002, which will be all but impossible if the auction is delayed. Consequently, the Bureau must reject any rule or procedure likely to lead to delay, including its proposal to link the upper and lower 700 MHz auctions by removing the EAG-based licenses from the lower 700 MHz auction and placing them in the upper 700 MHz auction. The proposal creates substantial risks that Auction No. 31 will be delayed without providing any concrete benefit either to the Commission or to potential auction participants. The Bureau therefore has no choice but to retain all lower 700 MHz licenses in Auction No. 44 and all upper 700 MHz licenses in Auction No. 31. To do otherwise would create a substantial risk that the Commission's and broadcasters' efforts to clear the upper 700 MHz band would be wasted and that the Commission would fail to adhere to its statutory responsibilities. The Bureau should reiterate its intention to keep to the current auction schedule and to keep the 700 MHz auctions functionally separate in every way, and should act quickly to eliminate the uncertainty that is developing among the parties, including the band-clearing broadcasters, that this auction will be delayed. The Commission has created the proper setting for a successful auction – it is now or never.

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To: Chief, Wireless Telecommunications Bureau

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("Paxson") hereby submits these Comments concerning procedures for auction of the upper 700 MHz frequency band proposed by the Wireless Telecommunications Bureau's (the "Bureau") *Public Notice*.¹ In setting its rules and procedures for the upper 700 MHz auction, the Bureau's overriding concern must be preserving the current June 19, 2002 auction date. **If the Commission intends to carry out its statutory duty to expedite early clearing of the upper 700 MHz band, Auction No. 31 must not be delayed.** Accordingly, Paxson strongly opposes the Bureau's proposal to link the upper and lower 700 MHz auctions

¹ See Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002: Comments Sought on Adding to Auction Inventory and Further Modifying Package Bidding Procedures, *Public Notice*, DA 02-260, Report No. AUC-02-31-A (Auction No. 31) (rel. February 4, 2002) (the "*Upper 700 MHz Auction Public Notice*"). The upper 700 MHz band is comprised of the spectrum at 747-762 and 777-792 MHz, and the auction of that spectrum is alternatively referred to as "Auction No. 31." The lower 700 MHz band is comprised of the spectrum at 698-746 MHz, and the auction of that spectrum is alternatively referred to as "Auction No. 41."

by moving the lower 700 MHz EAG-based licenses into the upper 700 MHz auction. Linking the auctions in this way is likely to further delay the upper 700 MHz auction, which would be fatal to band-clearing efforts currently underway. Additional delay threatens to waste several years of band-clearing efforts by the Commission and upper 700 MHz broadcasters and defeat the Congressionally recognized public interest in the early introduction of critically needed public safety and new wireless services in the upper 700 MHz band.

Paxson and other members of the Spectrum Clearing Alliance are increasingly concerned that uncertainty and confusion within the Commission threatens the June 19, 2002 auction date. Different Bureaus appear to have different perceptions of this agency's determination to stick with the June 19th date. After years of working on band-clearing, the band clearing broadcasters, such as Paxson, simply can not remain in limbo as another auction date disappears. The Commission must act quickly and unequivocally to reaffirm the June 19, 2002 auction date and to remove any doubt that the upper 700 MHz auction will proceed as scheduled.

I. Auction No. 31 Must Not Be Delayed.

Although the Bureau did not directly propose to delay Auction No. 31, Paxson is greatly alarmed that the proposal to link the auctions will lead to delay.² Such delay would result in the Commission (1) failing to fulfill specific statutory directives that it

² The Bureau made the same proposal in its *Public Notice* seeking comment on procedures for the lower 700 MHz auction. See Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002: Comments Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, DA 02-200, Report No. AUC-02-44-A (Auction No. 44) (rel. Jan. 24, 2002) ("*Lower 700 MHz Auction Public Notice*"). Paxson expressed its opposition to this proposal in Comments, filed January 6, 2002 ("Paxson Comments") and Reply Comments, filed January 13, 2002 ("Paxson Reply Comments").

auction the 700 MHz bands by September 30, 2002; (2) failing to fulfill its own policy of encouraging early introduction of public safety and new wireless services through voluntary band-clearing agreements; and (3) failing to fulfill the expectation created when it encouraged broadcasters to expend their own substantial efforts to pursue band-clearing.

Congress has shown its special concern for early upper 700 MHz band clearing by consistently directing the Commission to reclaim this spectrum as quickly as possible. In 1997, responding to the Commission's oft-noted struggle to find new spectrum for public safety and advanced wireless services,³ Congress directed the Commission to reallocate, auction, and assign the licenses in the upper 700 MHz band by September 30, 2002.⁴ Two years later, Congress accelerated the timetable, requiring such action be taken by September 30, 2000.⁵

Despite this clear statutory directive, the Commission has chosen to ignore the September 30, 2000 deadline.⁶ Citing its inability to simultaneously adhere to the

³ See, e.g., Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, *Notice of Proposed Rule Making and Order*, ET Docket 00-258, 16 FCC Rcd 596 (2001).

⁴ See 47 U.S.C. §§ 337(a), 309(j)(14)(C)(ii). These provisions were contained in the Balanced Budget Act of 1997, and were enacted due in no small part to "a longstanding need by public safety officials for more channels of radio communication." See Pub. L. No. 105-33, 111 Stat. 251 § 3003 (adding new Section 309(j)(14) to the Communications Act of 1934, as amended); § 3004 (adding new § 337 of the Communications Act); § 3007 (uncodified; reproduced at 47 U.S.C. § 309(j) note 3) (requiring deposit of auction proceeds by September 30, 2002), see *also* Remarks of Sen. John McCain, introducing bill to reallocate spectrum to public safety and advanced wireless services. 143 Cong. Rec. S945 (Feb. 4, 1997).

⁵ See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, App. E, § 213; 145 Cong. Rec. H12493-94 (Nov. 17, 1999).

⁶ See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, *Public Notice*, FCC 00-282 (rel. July 31, 2000) (dissenting statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani).

statutory deadline and “conduct an auction that is fair, efficient, puts the spectrum to the best use, and thereby best serves the public interest,”⁷ the Commission has delayed the upper 700 MHz auction five times.⁸ While this justification may have been proper at some point, that time has long since passed.⁹ The Commission now faces the September 30, 2002 auction deadline, of which it has been aware for five years.¹⁰ There is simply no excuse for further ignoring these statutory directives.¹¹

In addition to thwarting the will of Congress, further delay will scuttle the Commission’s own painstakingly constructed band-clearing policies. These policies are

⁷ See *id.* (separate statement of Commissioner William Kennard).

⁸ Auction of Licenses for 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002, *Public Notice*, Report No. AUC-01-31-D, 01-2394 (released October 15, 2001); Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 12, 2001, *Public Notice*, Report No. AUC-01-31-A, DA 01-266 (rel. Jan. 31, 2001); Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 6, 2000, *Public Notice*, DA 00-942 (rel. May 2, 2000); 747-762 and 777-792 MHz Band Auction Postponed Until June 7, 2000, *Public Notice*, DA 00-573 (rel. March 17, 2000); Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, DA 00-43 (rel. January 10, 2000).

⁹ Paxson did support a single brief delay of the auction late last year to accommodate global band clearing efforts. See Notification of *Ex Parte* Communication in WT Docket No. 99-168 (filed May 1, 2001).

¹⁰ See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, *Public Notice*, FCC 00-282 (rel. July 31, 2000) (separate statement of Chairman Kennard, indicating an unexplained preference for the express terms of the Communications Act over the statutory directive contained in the Consolidated Appropriations Act, 2000. See n.4&5, *supra*).

¹¹ In the lower 700 MHz auction proceeding, several parties argued that recent proposals by the Bush administration to delay the dates by which the 700 MHz auction must be held somehow justifies delay. Comments of United States Cellular Corporation, Report No. DA 02-260 at 2 ; TCA Comments, Report No. DA 02-260 at 3-4. This argument is meritless, because the Bureau cannot ignore current law in deference to a proposed statute. See, e.g., Review of the Pioneer's Preference Rules and Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055, 4060, n.53 (1994) (recognizing pending legislation related to Commission conclusion and stating “We recognize that this pending bill is not law and emphasize that our judgment on these issues is based on our own analysis and experience”). Moreover, similar proposals have been made in the past and rejected. See Paxson Reply Comments at 7-8.

the result of a deliberately considered multi-year rule making process.¹² As early as 1996, the Commission contemplated the early recovery of Channels 60-69 for reallocation to other services, announcing plans to minimize the number of DTV channels in the upper 700 MHz band and to consider requiring new licensees to compensate band-clearing broadcasters to further that effort.¹³ In June 2000, the Commission allowed upper 700 MHz entrants to reach voluntary band-clearing agreements with incumbent broadcasters, concluding that the public interest is “best furthered by enabling voluntary agreements that result in the expeditious and efficient recovery of [the upper 700 MHz band] for the legislatively specified commercial and public safety purposes.”¹⁴ Thus, the Commission constructed a regulatory framework to help clear the band, and, in response, numerous broadcasters have expended considerable resources to reach band-clearing agreements in an effort to fulfill the

¹² Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Order on Reconsideration of the Third Report and Order*, WT Docket No. 99-168, FCC 01-258 (rel. Sept. 17, 2001) (“*Upper 700 MHz Reconsideration Order*”); *Upper 700 MHz Third Report and Order*, 16 FCC Rcd 2709; Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000) (“*Upper 700 MHz MO&O*”); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476 (2000) (“*Upper 700 MHz First Report and Order*”); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, 12 FCC Rcd 22953 (1998) (“*Reallocation Report and Order*”); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Notice of Proposed Rule Making*, 12 FCC Rcd 14141 (1997) (“*Reallocation NPRM*”).

¹³ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10979-80 (1996).

¹⁴ *Upper 700 MHz MO&O*, 15 FCC Rcd at 20868 (2000) (emphasis added); see also *Upper 700 MHz Reconsideration Order*, ¶ 11 (citing *Upper 700 MHz First Report and Order*, 15 FCC Rcd at 534; *Upper 700 MHz MO&O*, 15 FCC Rcd at 20860-72; *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2703); See also Service Rules for the 746-764 and 776-794 MHz Band, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006, 11056 (1999).

Commission's "hope that before the end of 2006 additional parts of the band will be cleared as the result of voluntary agreements between broadcasters and licensees."¹⁵

The need for voluntary band clearing agreements has not receded since the Commission adopted these policies. Indeed, the need for early band-clearing has only become more acute in the wake of the events of September 11th. Chairman Powell has stated that band-clearing agreements would "free spectrum for uses the public deems important – such as public safety, which has become critical in the wake of threats to our nation's homeland."¹⁶ At the same time, the Association of Public-Safety Communications Officials has stressed that "the sooner television stations vacate channels 60-69, the sooner public safety agencies will have the opportunity to utilize the spectrum allocated for public safety."¹⁷ Only sustained band-clearing efforts on the part of broadcasters and the Commission can bring about these results.

In response to these needs, broadcasters have made significant band-clearing progress. Paxson and the Spectrum Clearing Alliance have worked aggressively to clear the upper 700 MHz band, securing a growing list of members who represent a significant number of incumbents in the upper 700 MHz band. Membership in the Spectrum Clearing Alliance is reaching the critical mass necessary to conduct the type of substantial band clearing wireless operators deem necessary to make the upper 700

¹⁵ *Upper 700 MHz MO&O*, 15 FCC Rcd at 20862-63.

¹⁶ Commission Chairman Michael Powell, *Public Safety Spectrum*, WASH. POST, Oct. 23, 2001, at A22.

¹⁷ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Third Report and Order*, 16 FCC Rcd 2703 (2001) ("*Upper 700 MHz Third Report and Order*").

MHz band useful for broadband and other 3G wireless services.¹⁸ Indeed, the Spectrum Clearing Alliance offers the Commission the only realistic means for accomplishing any substantial band-clearing.

These efforts require regulatory certainty to continue, and a further delay of the auction will eliminate any certainty regarding the Commission's band-clearing commitment. Delay likely means the end of the Spectrum Clearing Alliance and its efforts, but the Commission has not gone unwarned. As long ago as August 2000, Paxson alerted the Commission that the point beyond which band clearing would become impractical was fast approaching. Since then, Paxson frequently has urged the Commission that its band-clearing efforts would be undermined by further delay.¹⁹ With this proceeding, the Commission must squarely face the threat that without voluntary band-clearing, the upper 700 MHz spectrum will remain encumbered until the close of the DTV transition. If it chooses delay, the Commission will, in effect, be abandoning its band clearing efforts just when they appear to be bearing fruit, and wiping out years of effort on the part of Paxson and other members of the Spectrum Clearing Alliance.

II. Linking the Upper and Lower 700 MHz Auctions Must be Rejected.

Given these dangers, the Bureau's overriding criteria to judge its proposed Auction No. 31 rules should be whether they are likely to delay the upper 700 MHz

¹⁸ See e.g., Comments of US West, Inc., WT Docket No. 99-168, at 2 (July 19, 1999).

¹⁹ See Opposition of the Spectrum Clearing Alliance to MSTV Petition for Reconsideration of the Commission's *Order on Reconsideration of the Third Report and Order* in WT Docket No. 99-168, CS Docket No 98-120, MM Docket No. 00-39, FCC 01-258 (rel. Sept. 17, 2001), filed December 17, 2001; *Ex Parte* Presentation of Lowell W. Paxson in WT Docket No. 99-168, filed July 12, 2001; Paxson Comments in response to the *Upper 700 MHz MO&O* (filed Aug. 20, 2000). See also fn.8, *supra*.

auction. Any proposal likely to cause delay must be rejected. The Bureau's proposal to link the auctions utterly fails this test.²⁰

The Bureau's linking plan is a recipe for delay. Difficulties with auctioning the upper 700 MHz licenses have prompted five delays. There is no reason to expect that similar difficulties will not arise with respect to the lower 700 MHz licenses. Given the level of incumbency in the lower 700 MHz band, planning for use of the lower 700 MHz EAG-based licenses will be particularly complex. If the upper 700 MHz auction proceeding is any guide, such complexity will lead to carrier requests for delay. If the lower 700 MHz licenses are split between the auctions, any such delays, however legitimate, will delay both the upper and lower 700 MHz auctions. Indeed, in response to the *Lower 700 MHz Auction Public Notice*, several parties that support linking the auctions argued in favor of delaying the auctions, obviously seeing the connection between linking and delaying the auctions.²¹

Moreover, there is no logical reason for linking the auctions by commingling the upper and lower 700 MHz EAG-based licenses. The Commission has consistently treated the bands differently due to the differing levels of broadcaster incumbency (and the commensurate differing level of immediate usefulness of the spectrum).²² Although

²⁰ Conversely, the Bureau's proposals to change the methodology used to determine minimum acceptable bids and to establish an aggregate reserve price do not appear to present any significant risk of delay, and Paxson has no objection to these proposals. See *Upper 700 MHz Auction Public Notice* at 2.

²¹ See, e.g., Reply Comments of Leap Wireless International, Inc., DA 02-260 at 6; Reply Comments of United States Cellular Corporation, DA 02-260, at 2. The proceeding is response to the *Lower 700 MHz Auction Public Notice* is hereinafter referred to as the "Lower 700 MHz Auction Proceeding."

²² See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, FCC 01-364, GN Docket No. 01-74, ¶ 184 (rel. January 18, 2002) (rejecting preferential lower 700 MHz band-clearing rules). The Commission also has

there is a facile similarity between the upper and lower 700 MHz EAG-based licenses, they are not substitutes for one another. As Spectrum Exchange noted in the Lower 700 MHz Auction Proceeding, “[b]ecause the Upper and Lower 700 MHz band licenses bear little relation to one another in terms of clearing regime or value, including Lower 700 MHz Band licenses in the Upper 700 MHz Band auction will simply get in the way of an effective clearing and allocation of the Upper 700 MHz Band.”²³ By any relevant measure, the lower 700 MHz EAG-based licenses are more similar to the lower 700 MHz MSA and RSA based licenses than they are to the upper 700 MHz EAG-based licenses. If the Bureau thinks that the two groups of lower 700 MHz licenses are too dissimilar to be auctioned together, it is not a rational solution to place the lower 700 MHz EAG-based licenses in an auction with the even more dissimilar upper 700 MHz licenses.

The fundamental differences between the upper and lower 700 MHz EAG-based licenses also undermine any argument that the linking proposal would result in administrative efficiencies or resource savings to auction participants or the Commission. These alleged benefits are based on the idea that the same group of bidders will be interested in both the upper and lower 700 MHz EAG-based licenses, but that those parties will not be interested in the lower 700 MHz MSA/RSA based licenses. Thus, auction participants would be spared the expense of participating in both auctions, and the Commission would be spared the administrative expense of such

recognized these licenses’ essential differences by placing initial bids on the upper 700 MHz spectrum at a level four times higher than those for the lower 700 MHz licenses. *Compare Upper 700 MHz Auction Public Notice with Lower 700 MHz Auction Public Notice.* See also Spectrum Exchange Reply at 2

²³ See Spectrum Exchange Reply at 3.

duplicative participation. The crucial differences between the upper and lower 700 MHz EAG-based licenses, however, make it unlikely that the two groups of licenses will appeal to the same group of bidders. The large wireless carriers expected to pursue the EAG-based licenses most actively are unlikely to have as much interest in the lower 700 MHz licenses due to uncertainties regarding their future availability. It is also likely that regional and national wireless providers will need to participate in the lower 700 MHz auction to buy packages of MSA or RSA-based licenses to fill in coverage gaps that exist in their networks.²⁴ Therefore, no administrative or resource allocation benefit should be expected from the linking proposal.

To the contrary, the Lower 700 MHz Auction proceeding has demonstrated that the linking proposal will place additional administrative burdens on the Commission and auction participants. These include requiring the Commission to redesign its own internal systems, software, and tracking tools, developed over a period of many months for use in Auction No. 31 as currently configured, and requiring auction participants that have been anticipating Auction No. 31 for the past two years to revamp auction strategies and adjust to new license packages that would be made available under the linking proposal.²⁵ It need hardly be said that these additional burdens on the Commission and bidders presage delay of the upper 700 MHz auction. Ominously, the Commission partially justified a previous delay of Auction No. 31 by stating that the

²⁴ This also refutes commenters in the Lower 700 MHz Auction Proceeding who claimed that the linking proposal would eliminate larger wireless carriers from the lower 700 MHz auction and create more opportunities for small businesses. The likelihood is that large carriers' auction plans will remain the same regardless of the linking proposal.

²⁵ See Spectrum Exchange Comments at 7.

complexity of the auction justified it.²⁶ Given the policies at stake, the Bureau should avoid adding any more complexity to Auction No. 31.

Conclusion

Congressional directive, current Commission policy, and common sense lead inexorably to the twin conclusions that ***the auctions must not be linked*** and ***Auction No. 31 must not be delayed***. Delay of Auction No. 31 will stop broadcaster-initiated band-clearing cold, and the linking proposal courts delay. The licenses proposed to be auctioned together are essentially dissimilar and joining them promises to create more costs to the Commission and prospective bidders than the current arrangement.

²⁶ Auction of Licenses in the 747-762 and 777-792 MHz Band Postponed Until March 6, 2001, *Public Notice*, FCC 00-282, at 3 (rel. July 31, 2000).

Moreover, even if some slight benefit could be expected, that benefit pales in comparison to the real risk of delay that would be created by the linking proposal. With this proceeding, the Commission's early upper 700 MHz band-clearing policies hang in the balance. The Bureau should vindicate the Commission's and broadcasters' hard work by making absolutely certain that the upper 700 MHz auction remains as currently configured and begins as scheduled on June 19, 2002.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

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